

**SANITIZED DEC. 03-698 SV – BY GEORGE V. PIPER -- SUBMITTED FOR
DECISION ON 06/15//04 – ISSUED 07/01/04**

SYNOPSIS

SEVERANCE TAX – BURDEN OF PROOF NOT MET – Failure of the Petitioner to appear at hearing or to otherwise prove that a certain other person, and not Petitioner, is the entity responsible for payment of the severance taxes in question mandates that the assessment be upheld in its entirety; Petitioner has not shown that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner.

Thereafter, on October 21, 2003, the Director of this Division of the Commissioner's Office issued a severance tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 13A of the West Virginia Code. The assessment was for the period of January 1, 1998 through December 31, 2002, for tax, interest, through October 31, 2003, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner, *see* W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. In his petition for reassessment, Petitioner stated that he had a contract with a company whereby the other company was the one to pay all severance taxes.

2. At the hearing the tax examiner testified that Petitioner refused to be audited, although the tax examiner attempted on several occasions to get Petitioner's cooperation.

3. The tax examiner further testified that because of Petitioner's failure to cooperate, the tax examiner was forced to go to the sawmill to obtain a 2001 log purchase detail (showing that the sawmill operator purchased logs, not pulpwood, from the Petitioner), which the tax examiner used to estimate the major portion of Petitioner's total severance tax liability for all the audit years.

4. The tax examiner also determined Petitioner's pulpwood sales from similarly situated taxpayers which he had previously audited.

5. Petitioner's "Cut and Haul Agreement" with the other company expressly states in paragraph 1 as follows:

1. CONTRACTOR'S BUSINESS. The contract acknowledges and affirms that the Contractor [the Petitioner] is independent and is in the business of cutting and hauling wood, and has sufficient resources to cut and haul wood in accordance with this agreement. The Contractor will furnish all equipment and labor necessary to pursue this agreement and agrees to keep all records, make all payroll payments and deductions, set schedules of work and generally be responsible for everything necessary to fulfill this agreement. [The other company] is entitled to the cutting and hauling of the wood on the conditions set forth in this agreement, but has not right to control the manner of performance by the Contractor.

6. Petitioner failed to offer any evidence that it was not the entity subject to the severance tax.

DISCUSSION

The sole issue to be determined is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part, *see* W. Va. Code § 11-10A-10(e) [2002].

The "Cut and Haul Agreement" that Petitioner entered into with the other company does not contractually obligate that particular company to pay the severance tax on the logs which it purchased from the Petitioner. In actuality that agreement makes clear that Petitioner is in fact independent from the other company, including, "be[ing] responsible for everything necessary to fulfill this agreement." Additionally, the sawmill records show that the other company is purchasing logs from the Petitioner, which logs Petitioner is delivering to the other company.

The failure of the Petitioner to appear at the hearing to support his assertion that someone else is paying the tax is further evidence that the assessment in question must be upheld *in toto*.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

1. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether it is the entity liable for severance tax purposes. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the severance tax assessment issued against the Petitioner for the period of January 1, 1998 through December 31, 2002, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this severance tax assessment until this liability is fully paid.